

UNITED STATES OF AMERICA AND
THE STATE OF MARYLAND

Plaintiffs,

v.

MIRANT POTOMAC RIVER, LLC AND
MIRANT MID-ATLANTIC, LLC,

Defendants.

Civil Action No:

The United States of America ("United States"), by authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and the State of Maryland Department of the Environment, through the undersigned attorneys, allege as follows:

1. This is a civil action brought against Mirant Potomac River, LLC and Mirant Mid-Atlantic, LLC (collectively referred to herein as “Mirant”), pursuant to Sections 113 and 304 of the Clean Air Act (“the Act”), 42 U.S.C. §§ 7413 and 7604, for injunctive relief and the assessment of civil penalties for violations of a Stationary Source Permit to Operate (“Operating Permit”) at the Potomac River Generating Plant (“Potomac River Plant”) issued by the Virginia Department of Environmental Quality (“DEQ”), and the federally approved and enforceable Virginia State Implementation Plan (SIP).

2. The Operating Permit issued by the Virginia DEQ to the Potomac River Plant limited the facility's emissions of nitrogen oxides ("NO_x") during the ozone season – i.e., the period each year from May 1 through September 30 – to no more than 1019 tons, beginning in 2003.
3. By the end of the 2003 ozone season, the emissions of NO_x from the Potomac River Plant totaled approximately 2,128 tons, or approximately 1109 tons in excess of the Operating Permit's emission limit.
4. Nitrogen oxides, when emitted into the air, can adversely impact the environment and human health. Electric utility plants such as the Potomac River Plant collectively account for about 30 percent of NO_x emissions in the United States.
5. NO_x reacts with other pollutants and sunlight to form ground-level ozone, which scientists have long recognized as harming human health and causing environmental damage. Ozone can inflame and potentially cause permanent damage to human lungs, triggering respiratory problems and decreasing lung capacity, especially among children who are active outdoors. In addition, ozone can damage vegetation. Nitrogen dioxide ("NO₂"), a type of NO_x, is a dangerous pollutant that can cause people to have difficulty breathing by constricting lower respiratory passages. It can also weaken a person's immune system, causing increased susceptibility to pulmonary and other forms of infections. While children and asthmatics are the most sensitive, individuals suffering from bronchitis, emphysema, and other chronic pulmonary diseases also have a heightened sensitivity to NO₂ exposure.

JURISDICTION AND VENUE

6. This Court has jurisdiction of the subject matter of this action pursuant to Sections 113(b) and 304 of the Act, 42 U.S.C. §§ 7413(b) and 7604, and 28 U.S.C. §§ 1331, 1345, 1355, and 1367.
7. Venue is proper in this District pursuant to Section 113(b) of the Act, 42 U.S.C. § 7413(b), and 28 U.S.C. § 1391(b) and (c), because the violation that is the subject of this Complaint occurred at a the Potomac River Plant which is located within this District.

NOTICES

8. In accordance with Section 113(a)(1), 42 U.S.C. §§ 7413(a)(1), EPA has provided Mirant and the Commonwealth of Virginia (“Virginia”) with notice of Mirant’s alleged violations.
9. State of Maryland (“Maryland”) has provided notice to Virginia and to Mirant of the alleged violations, as required under Section 304(b) of the Act, 42 U.S.C. 7604(b).
10. The 30-day period between Virginia’s and Mirant’s receipt of actual notice and commencement of this civil action, as required by 42 U.S.C. § 7413(a)(1) and 7604(b), has elapsed.
11. EPA, Maryland, and Virginia have jointly discussed with Mirant the alleged violations at the Potomac River Plant through oral and written communications.

THE DEFENDANT

12. At all times relevant to this action, including the present, Mirant Potomac River LLC owns, and Mirant Mid-Atlantic LLC operates, the Potomac River Plant.
13. Both Mirant Mid-Atlantic, LLC and Mirant Potomac River, LLC are incorporated under the laws of the State of Delaware, and are "persons" within the meaning of Section 302(e) of the Act, 42 U.S.C. § 7602(e).

STATUTORY AND REGULATORY BACKGROUND

14. The Clean Air Act was designed to protect and enhance the quality of the nation's air so as to promote the public health and welfare and the productive capacity of its population. See CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1).

A. The National Ambient Air Quality Standards

15. Section 108(a) of the Act, 42 U.S.C. § 7408(a), requires the Administrator of EPA to identify and promulgate air quality criteria for each air pollutant which may endanger public health or welfare when emitted, and which results from numerous or diverse mobile or stationary sources. For each such pollutant, Section 109 of the Act, 42 U.S.C. § 7409, requires EPA to promulgate national ambient air quality standards ("NAAQS") requisite to protect the public health and welfare. Pursuant to Sections 108 and 109, EPA has identified and promulgated a NAAQS for ozone. See 40 C.F.R. §§ 50.4 - 50.11.
16. Ozone is formed when emissions of nitrogen oxides, or "NO_x," react with other pollutants and sunlight to form ground-level ozone. Scientists have long recognized ozone as harming human health and causing environmental damage.

17. Under Section 107(d) of the Act, 42 U.S.C. § 7407(d), each state is required to designate those areas within its boundaries where the air quality is better or worse than the NAAQS for each criteria pollutant, or where the air quality cannot be classified due to insufficient data. An area that meets the NAAQS for a particular pollutant is an “attainment” area. An area that does not meet the NAAQS is a “nonattainment” area. An ozone nonattainment area may be classified into one of five categories: marginal, moderate, serious, severe, or extreme, based on the severity of the air quality problem.
18. The Potomac River Plant is located in the Washington, D.C. ozone nonattainment area. The Washington ozone nonattainment area is comprised of the District of Columbia and portions of Virginia and Maryland. On January 24, 2003, EPA reclassified the Washington area from a “serious” to a “severe” ozone nonattainment area under the one-hour ozone standard. 68 Fed. Reg. 3410 (2003). Therefore, the air quality in Alexandria, where the Potomac River Plant is located, as well as the air quality for a significant portion of northern Virginia, Washington, D.C., and suburban Maryland, does not meet the federal ambient air quality standard for ozone.
19. The Commonwealth of Virginia and the State of Maryland are required by the Act to prepare and implement a State Implementation Plan (“SIPs”), which must be approved by the U.S. EPA, to provide for the attainment and maintenance of the NAAQS in areas within the states that are designated as in nonattainment. 42 U.S.C. § 7410(a)(1). In the case of the Washington ozone nonattainment area, Maryland shares responsibility and coordinates with Virginia and the District of Columbia in developing and implementing SIPs that provide for attainment and maintenance of the NAAQS for ozone.

20. Maryland has a compelling interest in abating the violations described above because excess NOx emissions from the Potomac River Plant directly contribute to the formation of ozone in the Washington ozone nonattainment area and to the continued difficulty of Maryland, Virginia and the District of Columbia to achieve compliance with the federal ambient air quality standard for ozone.
21. The Virginia SIP has been approved by EPA, is federally enforceable, and is codified at 40 C.F.R. Part 52, Subpart VV, §§ 2420 et seq.

B. The Potomac River Plant State Operating Permit

22. On September 18, 2000, the Virginia DEQ, in accordance with State Air Pollution Control Board regulation 9 VAC 5-80-800.C.2, issued an Operating Permit to the previous owner of the Potomac River Plant, the Potomac Electric Power Company (“PEPCO”). The Permit is included in the Commonwealth of Virginia’s SIP as a control measure to achieve the required air quality for the one-hour ozone nonattainment area and was approved by EPA as a source-specific requirement of Virginia’s SIP on December 14, 2000. 40 C.F.R. § 52.2420(d).
23. PEPCO later sold the Potomac River Plant to a Mirant affiliate and, at all times relevant to this Complaint, including the present, the Potomac River Plant has been owned by Mirant Potomac River, LLC, and operated by Mirant Mid-Atlantic, LLC.
24. For purposes of this Complaint, the relevant conditions of the Potomac River Plant Operating Permit are Condition 3, which specifically requires that “[d]uring each ozone season (May 1 through September 30), the emission units to which this permit applies in combination shall not emit more than 1,019 tons of oxides of nitrogen (measured as

NO₂);” Condition 4, which provides that compliance with the requirements of Condition 3 shall begin no later than year 2003, and Condition 7, which would enable Mirant to comply with the 1,019 limit by purchasing NO_x allowances, once a “NO_x trading program” came into effect.

C. The Clean Air Act Enforcement Provisions

25. Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1), provides that:

Whenever, on the basis of any information available to the Administrator, the Administrator finds that any person has violated or is in violation of any requirement or prohibition of an applicable implementation plan or permit, the Administrator shall notify the person and the State in which the plan applies of such finding. At any time after the expiration of 30 days following the date on which the notice of violation is issued, the Administrator may . . .

* * *

(C) bring a civil action in accordance with subsection (b) of this section.

26. Section 113(b)(1) of the Act, 42 U.S.C. § 7413(b)(1), and 40 C.F.R. § 52.23 authorize the Administrator of EPA to initiate a judicial enforcement action for a permanent or temporary injunction, and/or for a civil penalty of up to \$27,500, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701, against any person who has violated, or is in violation of any requirement or prohibition of an applicable implementation plan.
27. Section 304 of the Act, 42 U.S.C. § 7604, authorizes any person, including a state, to commence a civil judicial action for injunctive relief and/or civil penalties against any person alleged to have violated an applicable emission limitation or standard.

CLAIM FOR RELIEF

28. Paragraphs 1 through 27 are realleged and incorporated herein by reference.

29. On August 26, 2003, Mirant informed the Virginia DEQ that it had exceeded its ozone season NO_x emissions Operating Permit limit at the Potomac River Plant. As of that date, Mirant had already emitted approximately 1,174 tons during the ozone season, thereby exceeding the limit in the Operating Permit by approximately 155 tons.
30. After August 26, 2003, Mirant continued to operate the Potomac River Plant and, by the end of the 2003 ozone season, the emissions of NO_x from the Plant totaled approximately 2,128 tons, thereby exceeding the limit in the Operating Permit by 1109 tons.
31. EPA issued a Notice of Violation ("NOV") to Mirant on January 22, 2004, alleging violations of the Clean Air Act and the federally enforceable Virginia SIP. The Virginia DEQ issued a similar NOV to Mirant on September 10, 2003, and a revised NOV on October 20, 2003, alleging that the NO_x emissions from the Potomac River Generating Station exceeded the Operating Permit limit for the 2003 ozone season.
32. Based upon the foregoing, Mirant has violated the Operating Permit issued to the Potomac River Plant, which is codified as a source-specific requirement of the Virginia SIP, at 40 C.F.R. § 52.2520(d).
33. As provided in Section 113(b) of the Act, 42 U.S.C. § 7413(b), the violation set forth above subjects Mirant to injunctive relief and civil penalties of up to \$27,500 per day for each such violation. 28 U.S.C. § 2461, as amended by 31 U.S.C. § 3701.

PRAYER FOR RELIEF

WHEREFORE, based upon all the allegations contained in paragraphs 1 through 33 above, the United States of America and the State of Maryland request that this Court:

1. Permanently enjoin Mirant from operating the electricity generating units at its Potomac River Plant, except in accordance with the Clean Air Act, the Virginia SIP, the Plant's Operating Permit, and any other applicable regulatory requirements;
2. Order Mirant to take other appropriate actions to remedy, mitigate, and offset the harm to public health and the environment caused by the violations of the Clean Air Act, the Virginia SIP, and the Operating Permit, alleged above;
3. Assess a civil penalty against Mirant of \$27,500 per day for each such violation;
4. Award Plaintiffs the costs of this action; and,
5. Grant such other relief as the Court deems just and proper.

Respectfully Submitted,

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